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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner

vs.

ALLEN BAKKE, *Respondent*

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF THE COUNCIL ON LEGAL EDUCATION OPPORTUNITY AS AMICUS CURIAE

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CONSENT OF THE PARTIES

The Council on Legal Education Opportunity appears *Amicus,* with consent of both parties, in support of the position advanced by *Petitioners.* Letters of Consent were filed with the Clerk of this Court concurrently with the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The Council on Legal Education Opportunity (CLEO) consists of representative delegates from

each of five sponsoring organizations: The American Bar Association, the Association of American Law Schools, the La Raza National Lawyers' Association, the Law School Admission Council, and the National Bar Association. It conducts a federally funded program designed to increase the number of Blacks, ethnic minorities, and disadvantaged persons admitted to the national bar. Because of a narrowly focused recruitment program and an economic eligibility requirement, the overwhelming majority of CLEO participants are members of low-income minority groups.

Annually, some two thousand (2,000) applications for the CLEO program are received; and yet the program's size is limited to two hundred (200) participants. Acceptance in the program includes participation in one of seven (7) institutes conducted each summer with the cooperation of supporting law schools. Within the summer institutes, participants become acclimated to the law school environment; are introduced to substantive law teaching materials and required to demonstrate an ability to master them; and, are evaluated by law school faculty personnel for purposes of determining law school potential.

Each participant who is not already admitted to law school and achieves an institute evaluation recommending law school matriculation is assisted in gaining admission to law school by the institute director. Because the summer institutes endure beyond most law schools' admission cycle, CLEO participants may be given either a "conditional admit" pending the outcome of the institute evaluation; or, in some instances, the admission officer of a law school may choose to "leave a few slots open" in anticipation of positive

CLEO evaluations. Almost all CLEO students are admitted to law school on a "preferential" or "special" admission basis. (Once admitted to law school, the CLEO student receives a living stipend of $500.00 for each of six semesters of successful law school matriculation.)

Although the special admission program challenged by Allan Bakke is underway at a medical school, the court's ruling in this matter could have an impact upon the CLEO program, which relies upon the existence of special admission minority programs in law schools. Therefore, CLEO desires a ruling from this court which either has no effect upon current special admit programs in law schools, or holds them to be constitutionally valid.

STATEMENT

The Council on Legal Education Opportunity, as amicus curiae, does not intend to present an exhaustive analysis of all the constitutional issues both procedural and substantive which arise out of the facts in this case. Instead, it addresses those questions which permit its unique role as feeder to most minority admissions programs in law school to be of particular value to this Court and best represent the interests of its participants—present, past, and future. Many of the issues stemming from this case are the product of an emotional ferver sweeping the nation hardly reflecting the calm anticipated in the socially-disturbing sixties. Issues of "merit," "qualifications," "morals," "rights," and "preferences" associated with special admission programs in higher education abound. And yet, the real story of special admissions, its success, remains obscure.

Unfounded conclusions concerning the qualifications of special admission program participants as well as those of the majority group applicants rejected have been reached, adopted and promulgated with little basis in fact. Coordinated advertising campaigns denouncing public officials who speak out on these questions, attest to the money invested in attempts to sway public opinion.

These exaggerated reactions to programs which collectively account for less than three (3%) percent [1] of the professional school population are better understood when it is recognized that the underlying issues attendant here are economic ones. Blacks and other racial minorities, enjoy a very limited share of America's economic resources and benefits partly because of past exclusion from professional occupations. The majority population has traditionally enjoyed the economic base associated with exclusive possession of the professional job market and is being told that racially neutral "fairness" requires such a result.

The oppression of slavery and racial discrimination is and has been an economic oppression. The difference in family incomes between majority and nonmajority groups is startling: minority group families survive with median incomes less than two-thirds that of white

[1] Association of American Law Schools, Memorandum EC 77-41, Re. Revised Fall 1976 Minority Group Enrollment Statistics, April 1, 1977. Additional Information on Minorities and Medicine in the United States: A Survey of the Recent Literature for An Amicus Curiae Brief to the United States Supreme Court for The Mexican American Legal Defense and Educational Fund, *Bakke* v. *Regents of the University of California;* compiled by Eric S. Goldman, Class of 1978 School of Medicine, University of California, Davis; Davis, California 95616.

majority group families.[2] In 1976 the unemployment rate for racial minorities was almost double that of the white majority [3] at a time when this was one of the major national concerns of the majority population. Indeed, President Carter may well have gained the presidency because of his recognition and attention to this national concern.

Inflation threatens to wipe out much of the lifetime economic gains achieved by middle class families; while unemployment, a suggested solution to inflation, threatens the lower middle class with poverty. Racial minorities caught in this economic vise suffer doubly because they are not privileged to the decisions affecting these economic conflicts.

To reverse the trend of racial discrimination in this country which has endured through hundreds of years of struggle, Blacks and other minorities must have access to both the decision-making process and the lucrative job opportunities of professional status.

The monetary issue may not be the noblest of issues for such a monumental struggle, and in the long run it may not be as important as entrance into the nation's decision-making process at more significant levels; but it is a fundamental issue requiring the production and review of accurate factual data to resolve this ever-pervasive conflict.

Although this brief does not argue such questions as the right of professional schools to focus upon race as a factor in the admission process to prevent racial ex-

[2] Statistical Abstract of the United States, 405 (Table 650) (1975).

[3] Bureau of Labor Statistics *News*, Table 10 (Jan. 17, 1977)

clusion as a group, amicus briefs in support of this proposition are adopted.

The suggestion has been made that racial exclusion through standardized testing because of its "racially neutral" character can be justified as the "fault" of the victims. We think not.

SUMMARY OF ARGUMENT

I. The Supreme Court of California erred in finding that the special minority admission program of the medical school at the University of California at Davis is purely voluntary

A. Professional schools have traditionally relied upon a system of admissions, which virtually excludes Blacks and other minorities, although many of those excluded are qualified, if admitted, to successfully matriculate

B. Testing or measuring devices employed as part of the system of admissions may not be utilized as controlling criteria when it is certain that to do so effectively bars qualified racial minorities

C. Special admissions programs, promoting racial integration, are constitutionally mandated when it can be shown a professional school has failed to promote racial inclusion in the operation of its traditional admission practices while a pool of qualified racial minorities exists

II. To affirm the decision of the California Supreme Court is to disregard the guiding hand of congressional leadership in enforcing the Fourteenth Amendment

ARGUMENT

I. THE SUPREME COURT OF CALIFORNIA ERRED IN FINDING THAT THE SPECIAL MINORITY ADMISSION PROGRAM OF THE MEDICAL SCHOOL AT THE UNIVERSITY OF CALIFORNIA AT DAVIS IS PURELY VOLUNTARY

A. Professional Schools Have Traditionally Relied Upon a System of Admissions, Which Virtually Excludes Blacks and Other Minorities, Although Many of Those Excluded Are Qualified, if Admitted, to Successfully Matriculate

A determination that Blacks and other racial minorities have been historically excluded from majority professional schools and, consequently, the professions themselves, is certainly not difficult to reach.[4] However, the more important aspect of this determination is the realization that its truth is the truth of hundreds of years of uninterrupted racial discrimination, providing limited opportunity for the racially excluded victims to demonstrate an equal ability to perform.

Professional schools have traditionally relied upon a system of admissions, which virtually excludes Blacks and other racial minorities, although many of those excluded could, if admitted, successfully ma-

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[4] This is a well-settled point of fact which can be documented with varied approaches. The *de jure* exclusion of blacks and other racial minorities from all aspects of professional life in this country, particularly in the legal profession, is legendary. In fact, it was not until as recently as the last twenty years or so, that blacks could become members of the ABA, which now sponsors the CLEO program.

But perhaps the most graphic demonstration of the historic exclusion of blacks and other racial minorities from majority-controlled professional schools and subsequently the professions, themselves, can be seen through the judicial evolution of the rights of blacks in gaining access to professional school educaton; see generally, *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337 (1938); *Spiguel* v. *Board of Regents,* 332 U.S. 631 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950).

triculate. Just prior to World War II, for example, of the five thousand (5,000) students who graduated from medical school in 1940, only one hundred forty-five (145) were Black; President's Committee on Civil Rights, *To Secure These Rights,* 67 (1967). One hundred thirty (130) of them graduated from schools admitting only Black applicants. The similarity between these statistics on racial exclusion and those of today is startling: while 3% of graduating physicians were Black in 1940, only 2.1% of practicing physicians were Black as recently as 1970; Occupational Characteristics, 1970 PC (2)-74; U.S. Department of Commerce; Bureau of the Census, U.S. Government Printing Office, Washington, D.S. @ 593. The relationship between Blacks and the medical profession is paralleled throughout the professions. Tabulated data summarized from the 1970 Census reveals the number of Blacks in professional occupations.

TABLE I

Number of Blacks in Professional Occupations
Summary Table from 1970 Census:

Professional Occupation	Number of Blacks	Percentage of Total Sample
Religious Workers	12,951	5.7
Physicians & Surgeons	9,614	1.9
Dentists	1,983	2.3
Accountants	9,177	1.7
Chemists	3,332	3.4
Pharmacists	1,917	2.0
Engineers	13,375	1.1
Lawyers & Judges	3,236	1.3

Also today, of some 380,000 bar members, approximately 7,500 are Black, representing 1.7% of the profession.[5]

Exploration of the question of professional participation by Blacks and other minorities, however, is basically one of examining current admission criteria. To enter either medical school or law school an applicant must confront a standardized test which the authors contend is not an IQ test, and yet, no specific course of study taken just prior to the examination results in the achievement of a higher score; Association of American Law Schools, the Law School Admission Council and the Educational Testing Service, Pre-Law Handbook (1976). It is alleged that the purpose of the test is to rate on a continuum basis professional school potential, and to select from the top of this list assures professional education for the "best and the brightest." Although the tests themselves are exclusionary, only attempt to measure risk, and can neither predict performance in school or within the profession itself with any degree of certainty, the traditional selection process endures. Standardized testing, as an admission criteria, is recognized as the single, most responsible factor for the exclusion of Blacks and other minorities from the professions.[6]

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[5] These figures are derived from a mathematical extension of statistical data provided by James E. Caldwell of the American Bar Association, on behalf of the Council on Legal Education Opportunity before the Senate Subcommittee on Labor/DHEW Affairs; *Second Supplemental Appropriation,* FY 1976, H.R. 13172, p. 527.

[6] Although the notion is common in admission circles, documentation can be derived only inferentially. The Pre-Law Handbook, for example (cited above) provides a "grid" indicating law school admission test score and overall undergraduate grade point

In general, law schools have adhered to traditional admission policies and standards; applicants have been reviewed solely on the basis of undergraduate grade point averages and LSAT scores. Law Schools have clung to a belief that only the "best and brightest" should be admitted. This admissions policy, as carried out since the universal adoption of the LSAT criteria in 1960, consequently, means that the educationally and economically disadvantaged student's access to law school hinges upon performance on an exam which, experience has shown, will not be forthcoming. In fact, it has been argued that the LSAT is better at "predicting" race than performance in law school.[7]

However, in the past few years, law schools have attempted to recruit larger number of economically and educationally disadvantaged students. Most law schools, however, view their efforts as contrary to the maintenance of traditional admissions standards. In an effort to maintain traditional standards, the com-

average of those either accepted or entering law schools and in most a caveat is entered stating that the data excludes minority applicants because either the data is deemed irrelevant or, more probably, the lower LSAT scores of minority candidates would detract from the image the school wishes to project. Were the scores of minority candidates higher, they would probably be included with little fanfare. See generally, Law School Admission Council, Annual Council Report, June, 1973.

[7] In his report to members of the Law School Admission Council on March 16, 1973, W. Garrett Flickinger, Chairman, Test Development and Research Committee noted: "The fact that the predictors differentiate more sharply between black and white students than do first-year average law school grades is attributable, at least in part, to self-selection by black and white students, to the way in which various predictors were used by the law school in selecting these students, and probably to recruiting efforts in some instances." Law School Admission Council, Annual Report, Annual Council Meeting, June 5-7, 1973 @ 536.

mon approach has been to rigorously select a small handful of disadvantaged students whose formal credentials most nearly approximate those of the regular class, and admit that relatively small number to the school.[8]

As law school competition increases, more and more qualified applicants are being rejected who would have been admitted if the total number of applicants had been fewer. As a result of this increase in applicants, there has also been an "increase in the admission qualifications of those who are successful;" American Bar Association, *Report of the Task Force on Professional Utilization* (Chicago: American Bar Assoc., 1973) @ 15. An example of this is cited by the Warkov Study which was published in 1963. This study indicated "that in 1961, only eight of the then 134 ABA-approved law schools had an entering class whose median LSAT score was 600 or above." It is now estimated that, of the fall 1972 entering class, "more than 100, or over two-thirds of the now approved law schools, would fall into this category." Id. @ 15.

Much is made of the Predicted First Year Average (PFYA) which attempts to equate combinations of undergraduate grade point averages and LSAT scores with the probability that the achieved numerical scores can predict an applicant's ability to successfully negotiated law school. Dean Frederick M. Hart of the Uni-

[8] Attention is again directed to the method of reporting profiles of entering classes or of acceptable candidates in the Pre-Law Handbook, previously cited. In most instances, the proper credentials of racial minorities is excluded. If included, because of image concerns, in all probability, it is because the credentials of admitted racial minorities most nearly approximates the regularly admitted class.

versity of New Mexico was quoted by the Task Force on Professional Utilization; American Bar Association, report, @ 16:

> "We are now in the situation of rejecting residents of the State of New Mexico who, statistically, have an 84% chance of successfully completing their first year . . ."

Doubtless, many of those rejected, yet showing such promise, are today's representatives of racial minority groups confronting the closed door. Even the traditional methods of selection for law school admission predict success on the part of many excluded by the process!

But the argument that many of those minorities excluded could successfully matriculate does not rest upon an unproven prediction. Because programs similar to the one at the University of California at Davis, here challenged, did come into existence, and because alternate admission criteria were developed which took into account many other factors, *including race,* data exists to show that many rebuked by traditional admission criteria entered professional schools through special minority admission programs and successfully matriculated in competition with other admitted on the basis of high standardized test scores, in accordance with tradition. Empirically, it has been established to the satisfaction of most that the universal application of selection criteria utilizing such devices as the PFYA operate to exclude qualified Blacks, other minorities, and disadvantaged groups. Rappaport, Michael D., *The Legal Education Opportunity Program at UCLA: Eight Years of Experience;* The

Black Law Journal, Volume IV, No. 3, William S. Hein and Co., Inc., Buffalo, New York.

The CLEO program was developed as a solution to the dilemma of increasing numbers of qualified law school applicants screened by a law school selection process which virtually excludes the enrollment of Blacks, other racial minorities, and those from disadvantaged backgrounds. CLEO's purpose is to expand and enhance the opportunities for law study and practice by members of economically and educationally disadvantaged groups and thus help remedy the present imbalance in the legal profession. The present CLEO program has two central components of direct service to students in addition to its services to the law schools. The two primary student components are summer institutes for prospective law students and annual fellowships of $1,000.00 each to those successful graduates of the summer institutes attending law schools.

As indicated, attempts by law schools to increase minority enrollment disclosed that the LSAT was standing as an obstacle to these endeavors and the legal education community sought an alternative admissions device. The CLEO summer institutes were conceived to perform this service. CLEO deemed it feasible to revitalize the concept of performance as a means of determining legal aptitude, at least with regard to minority applicants.

The summer institutes offered mini-courses in substantive law along with legal research and writing. Initially, they were largely experimental and varied in program format. Some were primarily remedial, some attempted only to identify students who showed the greatest promise of succeeding in law school, and

others aimed at orienting students to the study of law. Currently, greater emphasis is placed on orienting students to law school methodology and on law aptitude and potential of the student, while remedial aspects are minimized. The following tabulated data accumulated by the CLEO National Office demonstrates rather vividly that the possibility of successful matriculation on the part of minority students with lower traditional credentials can be established quite well.

Table II

CLEO Participant Data

1. Number of students participating in CLEO since its inception.

1968	1969	1970	1971	1972	1973	1974	1975	1976	Totals
161	448	212	221	217	233	225	251	220	2,188

2. Number of students successfully completing summer institutes.

1968	1969	1970	1971	1972	1973	1974	1975	1976	Totals
151	444	197	210	213	229	225	244	216	2,129

3. Number of students completing summer institute and entering law school.

1968	1969	1970	1971	1972	1973	1974	1975	1976	Totals
131	400	191	207	210	218	219	234	203	2,013

4. Number of students who have graduated from law school.

1968	1969	1970	1971	1972	1973	1974	1975	1976	Totals
84	292	131	136	137	149	NA	NA	NA	929

5. Number of students who passed the bar and were admitted to practice.

1968	1969	1970	1971	1972	1973	1974	1975	1976	Totals
68	159	75	31	19	NA	NA	NA	NA	352*

* The information concerning the bar is grossly *understated*. The information is not generally known by the law schools and can only be determined with accuracy if it is known in which of the fifty (50) jurisdictions an individual sat for a bar exam. Where we know the state in which a CLEO student was certified to take a bar exam, we have checked him off a list of successful bar candidates received from each state.

6. Number of students who have withdrawn from or failed in law school.

	1968	1969	1970	1971	1972	1973	1974	1975	Totals
Academic dismissal	20	52	42	49	34	29	32	21	279
Withdrew-good standing	1	7	10	10	7	2	3	4	44
Withdrew-failing	8	18	7	5	1		3	3	45
Withdrew-military duty	5	6				1	1		13
Withdrew-illness	1	4		1		3	1		10
Withdrew-financial problems		2		1	2	2	2		9
Withdrew-unknown reasons	11	18	1	4	26	24	12	13	109
	46	107	60	70	70	61	54	41	509

Virtually all of CLEO's participants were not admissible to law school under the traditional admission criteria; the average LSAT score of the CLEO participant in recent years has been around 460 while selection data provided by law schools indicate significantly high scores are needed. Clearly, the utilization of traditional admission criteria excludes many who, if given the opportunity, could and would successfully enter the legal profession.

Over one hundred thirty (130) ABA-accredited law schools have recognized this fact and created special admission programs which participated in the CLEO program. But it is not here suggested that CLEO is the only way; overall attrition rates reflect parallels

supporting similar conclusions. Dean Richard Huber, Chairman of the Council on Legal Education Opportunity, while testifying before the Senate Committee on Appropriations, FY 1976 H.R. 13172, @ 459, introduced tabulated data on minority admission to law schools, in general, and made the following candid observation:

> [The tabulated data] shows the pattern of minority student enrollment which . . . has slowed even more than that of all other students. One interesting feature of this table is that by comparing the "first year" figures of one academic year with the "second year" figures of the succeeding year, a feel for the attrition rate among minority students can be obtained. *This rate is about equal to that of all other students.* For example, the first year class of 1974-75 lost 399 Black students out of its original complement of 1,910, an attrition rate of 21%; the overall attrition rate for non-minority students is not calculable from these tables but it normally runs approximately 20%.

Of those 1,910 Black students, no more than one hundred (100) could have been CLEO students. There can be little doubt of the minority candidate's ability to matriculate in law school. And, the same can be said for other professions.

To maintain universal application of a system of admissions which excludes minorities simply because it is cost-efficient cannot be consistent with the nation's goal of racial integration. Much is made of the issue of "qualifications" when racial discrimination is alleged. Concern is often expressed, in the face of such charges, that the exclusion of a group is primarily the "fault" of the excluded group in that it has prepared inadequately and is, therefore, "unqualified" to participate in the activity under scrutiny. Here, while questioning the constitutional validity of special minority admission programs in education, in general, and professional schools, specifically, minority candidates have again been the victims of a maligning press which seemingly insists upon giving credence to the "Big Lie" of unqualified candidacies. But, the performance record established by Blacks and other racial minorities ought to put to rest notions of any "unqualified" status pertaining to minority participants benefiting from the challenged special admit programs.

B. Testing or Measuring Devices Employed as Part of the System of Admissions May Not Be Utilized as Universally Controlling Criteria When It Is Certain That To Do So Effectively Bars Racial Minorities

Testing or measuring to establish qualifications, usually associated with employment, can be challenged when the outcome of such testing or measuring results in the exclusion of Blacks or other racial minorities from the employment activity, *Griggs* v. *Duke Power & Light Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. Under Title VII of the Civil Rights Act, protection is provided to private employees and *Griggs*, supra, in some instances, has been deemed inappropriate in cases involving official acts, conduct, or laws, *Washington, Mayor of Washington, D.C.* v. *Davis*, 426 U.S. 229 (1976) but not in others, *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2nd Cir. 1973). Situations covered by Fifth and Fourteenth Amendment Constitutional analysis, not invoking the "disproportionate impact" analysis, re-

quire plaintiff to show discriminatory "intent." *Washington,* supra.

While there is little doubt that the Constitution is the appropriate body of law to determine the validity of classifications involving official activity, there is considerable basis for determining that the disproportionate impact analysis did not have its genesis in *Griggs,* supra, but more so, in the landmark decision of *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). For the issue is not one of labels but, more so, one of determining the proof required to establish a *prima facie* case. Mr. Justice Stevens, in his concurring opinion in *Washington @* 253, sets out the flexibility of the claim:

> "Although it may be proper to use the same language to describe the constitutional claim in each of these different contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts."

Under certain circumstances, the constitutional protection may replicate the protection afforded by Congress under Title VII. This conclusion is strengthened by a comparison of *Strauder* v. *West Virginia,* 100 U.S. 303 (1879) with *Yick Wo,* supra, on the issue of constitutional equal protection standards. For, in deciding *Strauder,* supra, the court struck down a state statute barring Blacks from jury service while being careful to point out that although the statute was held to be unconstitutional, (because it focused specifically

upon an invidious racial classification) the Fourteenth Amendment did not prohibit the imposition of jury qualifications such as freeholder status or education which would obviously exclude a disproportionate number of Blacks. But, in *Yick Wo,* supra, the Court apparently spawned the "disproportionate impact" analysis under the aegis of Fourteenth Amendment equal protection when the court found in favor of a number of Chinese laundry operators challenging a licensing procedure which had worked to prevent only members of the Chinese race from securing laundry licenses, although there were others engaged in the laundry business.

The *Yick Wo* Court accepted the argument of racial discrimination in the administration of law neutral on its face but with a disproportionate impact upon the targeted populace. And so, the concept of recognizing a deviation from the consequences of pure happenstance, affecting an identifiable racial group, as being presumptively caused by racial discrimination, particularly, when it fits a previously established pattern known to be the by-product of racial discrimination, is not a new concept. However, it probably was reiterated in *Griggs* v. *Duke Power & Light Co.,* 420 F.2d 1225 @ 1247 (4th Cir. 1974), when Judge Sobeloff, dissenting in the Fourth Circuit recited: "Congress did not intend to force an entire generation of Negro employees into discriminatory patterns that existed before the Act." Subsequently, this Court unanimously endorsed the thrust of the Fourth Circuit dissent, *Griggs,* supra.

The Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Consti-

tution), seen as a whole, require the inescapable conclusion that a constitutional mandate exists to eradicate the badges and indicia of slavery. *Civil Rights Cases,* 109 U.S. 3 @ 20 (1883). One such "badge or indicia" developing with the termination of slavery was the imposition of the stamp of inferiority on racial groups; its impact upon the social and economic mobility of the victims has been devastating, primarily because identifiably crucial institutions, inherent in American society, have created a dual system—one superior and one inferior—perpetuating the myth of racial inferiority. Understandably, when the conduct of officials administrating within such institutions is placed under constitutional scrutiny, the quantum and nature of proof necessary to establish a prima facie case will vary from that imposed upon less harmful activity (See, generally, the majority opinion of Mr. Justice Powell in *McDonnell Douglas Corp.,* supra). Constitutional scrutiny of official conduct within such vital institutions will, and should often, follow the disproportionate impact standard imposed in a Title VII claim (See, generally, *Keyes* v. *District #1, Denver,* 413 U.S. 189 (1973).

Education—ridden with strife over the questions arising out of historical racial discrimination—is just such an institution which has prompted this court to shift the burden to a defendant upon a showing by plaintiff that the result of official activity, neutral on its face, has been to perpetuate past patterns of racial discrimination. Even prior to *Brown* v. *Board of Education,* 347 U.S. 483 (1954), where the separate but equal doctrine of *Plessy* v. *Ferguson,* 163 U.S. 557 (1896), was finally overruled, attempts were made to alter the traditional patterns of racial discrimination

in higher education. In *Sweatt* v. *Painter,* 339 U.S. 629 (1950), the precourser to *Brown,* supra, the tone was set for racial integration in professional schools when, interestingly enough, standardized tests were not the controlling criteria for law school entrance. Then, Blacks and other racial minorities were excluded as a matter of law under the *Plessy* doctrine. But the injury of racial discrimination, the discrimination upon which the *Plessy* doctrine was formulated, compelled a later court to reach the conclusion that Hemon Marion Sweatt, as a qualified Black law school applicant, was entitled to selection from the pool of white applicants to the "white" law school of the University of Texas because the newly created "black" law school was not equal, and could not be equal, in the provision of educational opportunities. The court in *Sweatt* @ 633-634 addressed the nature of the injury admirably:

> "In terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
>
> Moreover . . . [t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and in-

> stitutions with which the law interacts . . . The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School."

The provision of a quality, substantive education for those minorities long the victims of unchanging patterns of racial discrimination has been an elusive goal even with the assistance of this court. Although *Brown,* supra, squarely confronted the issue of a self-perpetuating dual society feeding from its segregated educational institutions, the court has had limited success in fashioning a remedy destined to reach the basic goals articulated by the *Brown* court.

Although this court has had little difficulty in striking down the laws associated with segregated public education, *Brown* v. *Board of Education,* supra, through *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the pattern of racial segregation has endured. In attempting to break this continuing pattern of racial discrimination in education, absent any statutory mandate compelling racial segregation, this court has applied the Fourteenth Amendment's equal protection clause to deal affirmatively with the patterns of *de facto* segregation even though the official conduct engaged in appeared to be neutral

on its face, *Keyes,* supra. In so doing, the court once again bridged the artificial gap between Title VII protection and fundamental constitutional equal protection. The "disproportionate" or "differential" impact analysis, according to *Keyes,* supra, is appropriate when dealing with matters of education even under pure equal protection analyses.

In *Keyes,* supra, the northern pattern of school segregation was confronted. The District Court found that the school authorities had engaged in "intentional" segregation of schools based upon official conduct despite the lack of a statutory mandate; this court approved, but in so doing, concern was expressed over the false distinction being created between *de jure* and *de facto* segregation. Mr. Justice Powell, author of the majority opinion, was prepared to accept a "differential" impact model of equal protection similar to the *Griggs'* "disproportionate" impact analysis developed in the employment area. The determination that the school board in *Keyes* intended to discriminate was achieved solely on the basis of an evaluation of official acts which appear to have been neutral on their face.

Subsequently, the view permitting evaluation of objective data, if for the purpose of establishing subjective intent, was apparently adopted by the Chief Justice in *Milliken* v. *Bradley,* 418 U.S. 717 @ 741, n. 19. The Chief Justice states:

> ". . . Disparity in the racial composition of pupils within a single district may well constitute a signal to a district court, at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. . . . However, the use of significant

racial imbalance in schools within an autonomous school district *as a signal which operates simply to shift the burden of proof,* is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy." (emphasis supplied)

The exclusion of Blacks and other racial minorities from professional schools is an affront to constitutional due process and equal protection, *Sweatt,* supra, which, if present, certainly ought to require an explanation. And yet, if a plaintiff challenged the retention of racially discriminatory patterns through the use of "racially neutral" standardized testing, excluding racial minorities as a group, only an application of the "differential" impact analysis to the constitutional claim would shift the burden of proof to administrating officials. Only then would they, as defendants, be required to justify racial exclusion; otherwise, summary judgment would be available to defendants.

Law school administrators, themselves, have argued that use of the PFYA as the controlling admission device would cause the exclusionary result. Faculties and administrators began the challenged special admission programs because they shared the view that there could be no justifiable explanation for racial exclusion and yet they wanted to preserve a system of admissions which otherwise is reasonably efficient and operates at minimal cost.

As a consequence of computerized processing of applicant undergraduate records and standardized test data, professional schools delegate, at little cost, a great deal of admission analysis responsibility; indeed it may be too costly to do much else for applicants

representing the majority population. But cost considerations are inappropriate to deny constitutional protection, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). Therefore, if such cost benefits are to be preserved, the additional cost of applicant screening, through special minority admission programs, such as those questioned here, is both justified and required if the traditional admissions process, presumably satisfactory for majority selection, is to be saved.

C. Special Admission Programs, Promoting Racial Integration, Are Constitutionally Mandated When It Can Be Shown That a Professional School Has Failed To Promote Racial Inclusion in the Operation of Its Admission System When a Pool of Qualified Racial Minorities Exists

The question of whether the special minority admission program of the medical school hereunder constitutional scrutiny out to be viewed as "voluntary" rather than in compliance with a constitutional proscription against the exclusion of qualified racial minorities, particularly from institutions of education, is answered in part by the duty imposed upon the officials of state supported educational institutions to achieve a system of applicant selection that does not exclude any particular racial group.

Without such special admission programs, focusing upon the victims of racially discriminatory patterns, as a class, institutions of higher education will revert to the pattern so clearly denounced in *Sweatt,* supra, for the Predicted First Year Average (PFYA) will replace the racially segregating statute. The increased demand for professional school education has created new opportunities for preserving the status quo which should be viewed with skepticism. The claims of

Blacks and other racial minorities, admittedly not parties to this litigation, to participate in the educational opportunities which provide access to the highest-paying, white-collar jobs, ought not be less than those of Blacks and other racial minorities who seek blue-collar job opportunities. And, it is that claim which constitutionally imposes the duty upon professional schools supported by state funds to develop nonexclusionary admission policies. The Fourteenth Amendment certainly imposes upon professional school administrators proscriptions against racial exclusion in the classroom at least as great as those levied against public school boards in the hiring and promotion of school system professional personnel such as in *Chance* v. *Board of Examiners,* 458 F.2d 1167 (2nd Cir. 1972).

There, a Board of Examiners was "designed to do away with the abuses . . . arising from the appointment or promotion of teachers . . . on a basis of favoritism and of political patronage, and to place the appointment and promotion of teachers on a competitive basis of merit," *Chance @* 1170, n. 6. The District Court held that the examinations prepared and administered by the Board of Examiners had the *de facto* effect of discriminating against Black and Puerto Rican applicants and, therefore, placed the burden on the Board to show the necessity for the exam to provide qualified applicants. The Second Circuit affirmed and in so doing set out what the use of a test to establish professional job qualifications ought to achieve:

> "One cannot read the documents submitted by Plaintiffs without experiencing great doubt over whether a lower score on the Board's examination necessarily meant poorer job qualifications or without wondering whether the examinations

> tested anything other than the ability to take a certain test." *Chance @* 1175.

It is hard to believe, in light of this reasoning, that standardized tests in conjunction with less-weighted other factors, including undergraduate grade point averages, projected onto a numerical continuum ought to be permitted to control the selection process for professional school classrooms to the exclusion of Blacks and other minorities. When it is known that selection by other means, utilizing race as a factor will produce qualified participants in the educational process from all races, not to do so is certainly in opposition to both constitutional law and reason. The fact of virtually complete racial exclusion with no intent to engage in racial discrimination, *Loving* v. *Virginia,* 388 U.S. 1 (1967), which *may* be the situation in professional institutions not having "special admission programs," ought not be grounds to deny a claim; for, the "protection afforded racial minorities" by the Fourteenth Amendment has no such limitation, *Chance @* 1175:

> "The harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification 'be justified by legitimate state consideration.'" (citations omitted)

Special admission programs in professional schools exist in response to this constitutional requirement and as a "consequence" are in no sense the product of adventurous volunteers justifying the finding of unconstitutional reverse discrimination.

Allan Bakke can make no claim similar to that of racial minorities. No duty exists on the part of public administrators to guarantee any individual applicant a review for selection purposes "equal" to that required to prevent racial group exclusion.

II. TO AFFIRM THE DECISION OF THE CALIFORNIA SUPREME COURT IS TO DISREGARD THE GUIDING HAND OF CONGRESSIONAL LEADERSHIP IN ENFORCING THE FOURTEENTH AMENDMENT

The California Supreme Court decision rendering affirmative action programs, such as the one conducted by the University of California at Davis, unconstitutional reverse discrimination as a consequence of using race as a factor to be considered in the admissions decision, focuses upon the equal protection clause of the Fourteenth Amendment. The development of such programs in many institutions of higher education has caused legal scholars and laypersons alike to join in the debate over whether the equal protection clause should be read to permit *any* racial classifications benefiting racial minorities in higher education where state action is involved.

As the California Supreme Court noted in its majority opinion:

> "The question before us has generated extraordinary interest in academia, as well as a proliferation of debate among legal writers and commentators. (See, for a mere literary sampling, Redish, *Preferential Law Admissions* (1974) 22 UCLA L. Rev. 343; *DeFunis Symposium* (1975) 75 Colum. L. Rev. 483; Sandalow, *Racial Preferences: The Judicial Role* (1975) 42 U. Chi. L. Rev. 653; Symposium, *DeFunis: The Road Not Taken*

> (1974) 60 Va. L. Rev. 917; Ely, *Reverse Racial Discrimination* (1974) 41 U. Chi. L. Rev. 723; O'Neil, *Preferential Admissions* (1971) 80 Yale L.J. 699; Graglia, *Special Admission to Law School* (1970) 119 U. Pa. L. Rev. 351; Ginger (edit.), *DeFunis versus Odegaard and the University of Washington* (1974); Cohen, *The DeFunis Case: Race and the Constitution,* The Nation (Feb. 8, 1975) 135; O'Neil, *Discriminating Against Discrimination* (1975)). No fewer than 26 amici curiae briefs were filed in the United States Supreme Court in *DeFunis.* Indeed, Justice Brennan, dissenting in *DeFunis* from the determination of mootness, remarked that "[F]ew constitutional questions in recent history have stirred as much debate . . ." (416 U.S. @ 350).

One school of thought considers the question of affirmative action in higher education to be one of equal 'policy,' and as such sees the issue as one of the judicial role in a democracy monitoring a legislative power; and, because policy questions become value judgements under the equal protection clause, appropriate sensitivity to the values served by a democratic decision-making society requires courts to defer to legislative judgments unless they clearly transgress constitutional traditions. See, generally, Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,* 42 U. Chi. L. Rev. 653 (1975).

Consequently, this school of thought concludes, "nothing in American constitutional tradition requires courts to deny legislatures to power to authorize preferential admissions policies for racial and ethnic minorities." Id. @ 654. But the issue is not whether an explicit congressional mandate exists, but more so,

whether Congress has offered its "guiding hand," *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). While the Fourteenth Amendment may have limited governmental powers to engage in racial discrimination as a badge and indicia of slavery, *Civil Rights Cases,* supra, it created new causes of action as well as remedies on behalf of those protected. Case law in support of this point is legion. To cite only a few, see *Brown* v. *Board of Education,* supra; *Louisiana* v. *United States,* 380 U.S. 320 (1970); *Jones* v. *Mayer,* 392 U.S. 109 (1968); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229; *Tillman* v. *Wheat-Haven Recreation Association,* 412 U.S. 431 (1973). See also, Kinoy; *The Constitutional Right to Negro Freedom,* 21 Rutgers L. Rev. 387 (1967).

Under the Fourteenth Amendment's equal protection clause, courts have articulated causes of action to fit developing patterns of racial discrimination against not only the originally targeted Blacks, but also, other racial and ethnic minorities, including Chinese (*Yick Wo* v. *Hopkins,* supra); Puerto Ricans (*Chance* v. *School District #1,* supra); Chicanos (*Keyes* v. *School District #1, Denver,* supra); and Asians (*Lau* v. *Nichols,* 414 U.S. 563 (1974). It did so while, at the same time, conceding the power of Congress to impose its guiding judgments through legislation, *McCulloch* v. *Maryland,* 17 U.S. 316 (1819); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *United Jewish Organizations of Williamsburg, Inc.* v. *Carey,* 45 U.S. L.W. 4221 (March 1, 1977).

Specifically, this court has ruled that "§5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment;" *Katzenbach @* 651.

In keeping pace with its Fourteenth Amendment equal protection responsibilities, Congress passed the Civil Rights Act of 1964 which expressed the need for affirmative action and not only in instances where a finding of past discrimination had reduced participation by protected groups in program activities receiving federal funds; but, also in the absence of a direct finding of prior discrimination, when needed to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. Title 45 Code of Federal Regulation, Sec. 80.3 (b)(6). See also, *Gerrman* v. *Kipp,* 45 L.W. 248 (W.D. Mo. April 7, 1971). The Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973 et. al. is but another example.

Congress has explored the social utility of racial integration and established a public policy in favor of such. See, generally, Title VI of the Civil Rights Act of 1964 (Pub. Law 88-352: 88th Congress, July 2, 1964); Title IX of the Education Amendments of 1972 (Pub. Law 92-318; 92nd Congress, June 23, 1972); 45 C.F.R., Sec. 80.3 (b)(6); and the Voting Rights Act of 1965.

Consistent with that public policy and its responsibilities under the equal protection clause, the CLEO program enjoys the blessing of Congress.

Although the creation of the private sector, the CLEO program is presently funded by the Depart-

ment of Health, Education and Welfare through legislation enacted in June, 1972. Congress enacted the Educational Amendments of 1972 (Pub. Law 92-318; 92nd Congress, June 23, 1972). The significant provisions of that legislation, from CLEO's vantage point, were included in Title IX, Part D, Sections 961 (a) (a) *et. seq.* Section 961 established the purpose of the legislation as being, "for persons of ability from disadvantaged backgrounds as determined by the Commissioner, undertaking graduate or professional study."

This legislation imposed a one million dollar ($1,-000,000.00) ceiling on fellowship awards, Sec. 961 (b) (d) and authorized DHEW to provide living allowances and mandated *minimum* stipends in the amount of $2,800 a year, Sec. 963 (a). Additionally, it anticipated cost-of-education allowances to the participating universities in the amount of 150% of the student support awards, Sec. 963 (b).

The impact of such legislation would have been to severely limit CLEO's significance; presently, the program has been instrumental in gaining admission to law school for some two hundred (200) would-be attorneys annually. The 1972 legislation would have reduced its significance because of the one million dollar ceiling in conjunction with the student stipend size of $2,800 along with cost-of-education allowances to law schools. Instead of 200 participants annually, the program size under this legislation would have been some forty (40) institute participants. To preserve the CLEO program in its original form, the 1972 legislation was amended once again.

On July 22, 1974, Title IX, Part D of the Higher Education Act of 1965 was amended as follows: Sec-

tion 836 of the amendment entitled "Assistance for Training in the Legal Profession," set out the criteria of eligibility for those individuals who may become recipients of the legislated stipends, Sec. 966 (b) (1); provides for counseling, Sec. 966 (b) (3); permits preliminary training for the legal profession, Sec. 966 (b) (4); allows stipends, Sec. 966 (b) (5). In addition, Sections 962 and 963 of Title IX, allocating minimum student stipends of $2,800 were rendered ineffective, but the one million dollar ceiling was retained. This amendment to accommodate CLEO stands as an implicit congressional endorsement.

Under this legislation, CLEO has a legislative life which guarantees existence until June 30, 1978. That life has now been extended to October 1, 1979. The "million" dollars in grant funds has been dispersed annually as follows: The Division of Special Services in the Office of Education covers part of the summer institute costs in the amount of two hundred thousand dollars ($200,000.00) from discretionary funds available to the Commissioner, while the seven hundred fifty thousand dollars ($750,000.00) used to sustain the National Office, ($210,000.00) and provide student stipends for those successfully completing the summer institutes who ultimately matriculate in law school, ($540,000.00) is appropriated annually. And, as a consequence, Congress has an annual opportunity of program review.

For example, on June 27, 1975 the *Congressional Record* disclosed a published account of the Senate's Education Appropriations Bill for 1976. It revealed that the $750,000.00 CLEO appropriation had not been included.

Although President Ford vetoed this appropriation bill, Congress overrode the veto and the appropriation bill was enacted into law. The ultimate success of congressional effort, of course, precluded any attempt to "backdoor" CLEO's way into the appropriation bill through an amendment.

However, subsequent discussions were held with DHEW personnel regarding the possibility of including CLEO in the request for a DHEW supplemental appropriation bill (which was to be forwarded to Congress in early November, 1975). CLEO learned, however, that DHEW would not request additional funds on behalf of the program because of an administrative moratorium on any additional DHEW program funding. This change of events necessitated a serious reevaluation of the strategy necessary to secure funding which had relied heavily upon DHEW's commitment to the program.

The proposed strategy change required a more active degree of participation from CLEO's sponsoring organizations, particularly the American Bar Association, Association of American Law Schools, and the National Bar Association. This participation involved educating members of both House and Senate Labor-DHEW Appropriations Subcommittees as to the program's validity.

Contact was made with Senator Richard Schweiker, a member of the Labor-DHEW Appropriations Subcommittee, to secure his assistance in sponsoring an amendment for full funding on behalf of CLEO before his subcommittee. This he agreed to do; however, in the actual proceeding to carry out this task, the amendment was defeated in Subcommittee by a vote of 4 to 3.

With this defeat in the Senate, CLEO's sponsors directed their efforts almost exclusively to securing CLEO's inclusion in the second supplemental appropriations bill in the House in March, 1976.

Intensive lobbying efforts secured the assistance of the Congressional Black Caucus, particularly Congresspersons Yvonne Burke and Louis Stokes. Congressman Stokes sponsored an amendment for funding in the House Labor-DHEW Appropriations Subcommittee which was ultimately approved by the entire House on April 13, 1976 as H.R. 13172.

In order to determine the viability of the CLEO program as a congressional endeavor, Senator Brooke scheduled hearings before the Senate Labor-DHEW Subcommittee on April 6, 1976. Those testifying on behalf of CLEO before the Subcommittee included Council Chairman, Dean Richard Huber; Executive Director of the National Bar Association, Elihu M. Harris; President-Elect of the Law School Admission Council, Professor William Hall; American Bar Association representative, James E. Caldwell; La Raza National Lawyers' Association's representative, Alfonso Gonzales (who submitted a written statement for the record, but did not testify); two CLEO participants at the Georgetown Law Center, Messrs. Reginald Turner and Richard Jones; and CLEO Executive Director, Alfred A. Slocum.

Those hearings demonstrated to the satisfaction of Congress the effectiveness of the CLEO program. Testimony was adduced, Senate Subcommittee on Labor/DHEW Affairs; *Second Supplemental Appropriation,* FY 1976, supra @ 457, which defined CLEO's target population:

". . . Frequently, the CLEO participant is one who, by reason of cyclical poverty and consequent educational deficiency, may have experienced initial difficulty in adjusting academically to the college environment. His or her cumulative grade point average, however, may reflect an upward trend characterized by marked improvement during the third and fourth years. A large number of CLEO students have also, because of their disadvantaged background, attended undergraduate colleges that are less demanding academically than the more prestigious institutions that furnish candidates for law school. When these factors are produced by membership in an isolated group, whether minority or white in ethnic terms, the student fits the concept of disadvantaged.

In response to its own thought processes and the needs of society, CLEO has broadened its concerns to encompass disadvantaged white students. Yet it comes as no surprise that the ratio of minority students in the CLEO program remains overwhelmingly high. One readily identifiable target population of disadvantaged white students from which CLEO draws can be found in Appalachia.

The argument is often heard that no person with a baccalaureate degree can be considered disadvantaged, since he or she has an advantage over a large portion of the population. What should be remembered, however, is that this same person can be disadvantaged with respect to other college graduates attempting to enter the legal profession. Without some affirmative response to the underrepresentation of these groups in the legal profession, the patterns that have in the past kept these groups seriously underrepresented in the socially and economically powerful institutions of society and prevented their ready access to the mechanisms for peaceful dispute resolution through the legal system will continue as part of

the cyclical poverty to which this program is addressed."

The continuing concerns which prompted this educational effort on behalf of CLEO's target population were also reestablished for the benefit of the Senate Subcommittee, *Second Supplemental,* supra @ 462, in the following terms:

". . . The concerns of 1968 were rather concrete and immediate. In 1976 we are faced perhaps with less violence but many of the problem areas that generated the violence of the 60's and early 70's are still with us. And the numbers by which we measure our progress within the legal profession are improving only slightly. Although it is impossible to take an accurate count of the racial composition of the American bar, we are confident that well under 3% of the lawyers in the United States today are members of ethnic minorities; almost certainly no more than 1.5% are Black; about 0.3% are Chicano; about 0.2% are Asian-American. We have no means of estimating how many non-minority lawyers come from backgrounds of cyclical poverty, but we do know that this small number will dwindle as the costs of obtaining both undergraduate and legal education continue to spiral upwards toward levels that only the most affluent can afford, unless substantial aid is available.

The media have been portraying law graduates recently as having great difficulties in locating suitable employment, but it appears that law school enrollments are reflecting a relatively rapid adjustment to the forces of supply and demand. The most recent statistics (See Table I) show that law school enrollment has leveled off after a decade of dramatic increase. The prevailing approach of legal education has been to attempt making

legal education available to all who were qualified and desired to enter the profession, leaving market forces to operate freely. This approach is designed explicitly to avoid closing or restricting access to the profession, but in a time of economic retraction it runs the danger of reducing access possibilities not on the basis of reasonable probability of academic success but on financial grounds.

The continuing need for CLEO is illustrated by the unfortunate fact that the level of minority enrollments may be tapering off even more rapidly than other students. Overall enrollment increased by 5.6% in 1975, while minority enrollment increased by only 4.12% in 1975 compared to a 10% increase in 1974. The number of minority students enrolling in the first year of law school has held virtually steady for the last two years, rising by only 1.1% since 1974. These figures, as well as our own experience, indicate that the demand for minority lawyers will continue to rise beyond the availability. Affirmative action programs throughout the country indicate that very few employers are in a position of under-utilization of minority lawyers when the availability pool is defined as present law graduates, but if the availability pool is defined as all persons in the target ethnic groups, then under-utilization is extensive. This disparity reflects the lack of minority lawyers that still persists to the present day and which will continue to place minority lawyers in relatively high demand."

Finally, during the Senate Hearings, *Second Supplemental,* supra @ 530, Senator Brooke asked the ultimate question:

> "Do you feel that even though CLEO students need some advance tutoring they still do well both academically and later in the outside world?"

The response given to the Senator probably is the best indication of why *Bakke* ought to be reversed, *Second Supplemental,* supra @ 530:

> "This is a difficult question to answer because the concept of 'doing well' is both relative and subjective; the whole issue of psychometrics comes into play: Is law school and the bar exam directly related to the actual role played by an attorney? However, some concrete data is available . . . bar results are also included."

For bar result data see Table II, supra.

> "Beyond law school and the bar, a survey was made of the first two graduating classes. The attached Report on Survey of 1971, 1972 CLEO Graduates states: . . ."

Report on Survey
of 1971, 1972 CLEO Graduates

Introduction

The statistical information contained on the following pages was obtained by mailing the questionnaire in Exhibit "A" (attached), to members of the 1968 and 1969 CLEO classes who graduated from law school in the years 1971 and 1972 respectively. The 1971 graduating class was surveyed in August of 1971 while the 1972 graduating class was surveyed in July of 1972. In addition, the responses were supplemented by a later mailing of postcards which sought similar though not as comprehensive information on the graduates. This explains the apparent discrepancy in the number of responses to different items on the form.

A word should be added here about the type of questions contained in the form. The respondent was asked to indicate whether he was currently employed, how he obtained his

job, where the job was located, what type of work he was engaged in, how much he was earning, and where he intended to take the bar. It was hoped that this occupational profile would reveal underlying attitudes of minority law students toward the CLEO experience and toward the legal community. Lastly, although the form contained a question regarding bar performance, few respondents had received any results at the time of the survey.

The responses of the graduates were carefully compiled and the results examined. Below, in narrative form is a breakdown of those results. Statistical data will be found on Exhibit "B" of this report.

1971 Class

Thirty-six (43%) of the 83 students expected to graduate from their 1968 entering class responded to the questionnaire. Their responses are as follows:

Number employed—Seven of the 36 were unemployed. Of the seven, 3 were looking for work, one student had delayed graduation, and 3 were going for additional degrees in business administration, law and urban planning.

Type of employment—Of the 29 students who did indicate employment, 3 were engaged in private practice, four others were employed by state and municipal governments in the offices of the attorney general or district attorney while an eighth was a judicial clerk in the county superior court.

The majority of the 29 students who were employed were engaged in the field of public

service law. For example, 22 students responded that they worked with disadvantaged groups—the Black, the Chicano, the Indian.

Three (3) of the graduates employed in the area of public service were working in "non-legal" capacities; as a legal instructor in a small Black college which was struggling for survival, as an associate director of a college upward bound program, and as a planner for a city demonstration agency.

One third (7) of those employed in public welfare legal organizations were associated with the Reginald Heber Smith Fellowship Program, five (5) were working in legal aid clinics, and two (2) were employed by the NAACP Legal Defense and Education Fund (one of these two graduates as being assisted in setting up his own law practice, the other was doing research and preparing briefs and pleadings in largely southern class actions related to civil rights). Three of the four employed by the federal government also had jobs which related to the needs of those underrepresented in our society. One graduate was a civil rights officer with a federal highway administration; another was a clerk with the E.E.O.C. and the third was awaiting appointment as Assistant Regional Director of the Atlanta HEW Office of General Counsel.

Salary—Salary-wise, more than half (16) of the employed CLEO graduates were earning between $10,000 and $12,000 per year. Six others were earning less and eight were earning more.

1972 Class

Of the 287 graduates who were sent questionnaires 179 (63%) responded either in whole or in part. Most (144) of the respondents (about 80%) indicated that they were employed. The remainder were not yet working though this was not attributable to any single factor. Of those who had obtained a job, the largest group (68) was earning between $10,000 and $12,000 per year. A smaller number (23) were earning less than $10,000 per year while 37 were earning more than $12,000 per year. Sixteen others gave no salary information.

When asked whether they were working with disadvantaged people, ninety-seven (97) responded yes, while twenty-four (24) responded no.

Type of employment—In response to the question dealing with the *area* of law in which they took employment the graduates answered as follows: Fifty-seven (57) indicated they were working for public interest organizations (e.g. Reginald Heber Smith Fellowship Program, Legal Aid Society), twenty-two (22) said they were working with the federal government (e.g. NLRB, HEW), ten indicated employment with state government (e.g. attorney general's office), seventeen (17) indicated employment with municipal government (e.g. district attorney's office), twenty-five (25) indicated employment in a private capacity (e.g. law firm) and five (5) were working in a non-legal capacity (e.g. consultants).

Place of employment—Evidence that the majority of the graduates obtained employment outside their hometown is found in the responses to the question: Are you employed in your hometown? Less than half (44) said yes, while seventy-six (76) said no.

Time *and manner of employment*—when asked when they were offered their jobs ninety-eight (98) said they had been offered employment prior to graduation while twenty (20) indicated that they had been offered their jobs after graduation. The vast majority (80) found jobs through their own initiative, nine (9) through the assistance of a dean or instructor, thirteen (13) through a placement office, nine (9) through a recruiter and seventeen (17) through other means.

Location *of bar examination*—When asked where they had taken the bar exam the respondents named a total of twenty-six different states. California was far and away the most desired (28) with New York a poor second (13). The clear preference was for the more populous, industrial states.

Almost no responses were received on the question dealing with performance on the bar. This was primarily due to the fact that the results were not yet in at the time the responses were returned. As was indicated in the introduction, the questionnaires were mailed in August and July, 1971 and 1972 respectively. Since most jurisdictions do not provide bar results for several months (e.g., California and Washington, D.C. publish results in December), the responses were returned by the graduates before they had heard any word from the bar. A follow-up mailer is presently being prepared for the 1971 and 1972 graduates requesting information on bar results.

Analysis

A number of inferences can be drawn from the results of the Survey of both the '71 and '72 classes. First and foremost, is that the graduates are proving out one of the basic tenets upon which the program was founded, i.e., they are focusing their energies and skills upon the problems of the poor and the disadvantaged. Their insight into and first-hand knowledge of the poverty cycle when combined with the analytical and professional abilities they possess as lawyers, represents a powerful combination indeed. It has long been feared that these graduates once having finished law school would simply forget or reject any association with or sense of obligation to the disadvantaged communities from which they came. Demonstrably, this has not happened.

It is difficult to measure the effects of this development on the disadvantaged community. This is so because some of the effects are intangible. Hope and renewed confidence in the basic fairness of the society in which they, the disadvantged live, are two significant yet nonquantifiable effects. In addition, the presence of sensitive indigenous advocates has the effect of reassuring the poor that their interests are being protected by those who understand their problems and frustrations.

A second and equally encouraging inference that can be drawn from the survey is that although most CLEO graduates are going into the area of legal services, nevertheless, many others are moving into every other major area of law (with the possible exception of teaching). The results of the 1972 survey of graduates provide an excellent example. Those results indicate that the graduates are moving into federal, state and municipal governments as well as into the private sector. This is an encouraging development indeed in that it indicates a receptiveness to minorities in all areas of law. It is also encouraging in that it provides the opportunity for exposure to significant areas of legal expertise such as administrative, business and corporate law. Without a doubt this panoply of legal experience will better enable minorities to participate substantively and meaningfully at all levels of our system and the legal profession in particular.

With regard to income, CLEO graduates appear in the main to be commanding reasonably good salaries, with some students doing exceedingly well (over $16,000.00 per year). Although comparative data for non-minority graduates is not immediately available, it is suggested here that a nominal differential if any, exists. Although the salaries of CLEO students appear to be competitive, the preference for seemingly lesser paying public service employment manifested by the CLEO graduates indicates that salary was not the deciding factor in job selection.

This is reinforced by the figures which indicate that the vast majority obtained their jobs by going out on their own, relying upon their own initiative. This conscious process of job hunting and job selection strongly suggests that the graduates desired to get into public interest law and actively sought it out. These same figures also indicate that the law schools are not very active (for whatever reason) in the area of job development and placement of minority students.

Summary

To summarize then, the survey results indicate that CLEO graduates are returning to serve as lawyers in those disadvantaged communities from which they initially emerged. In addition, CLEO graduates are finding their way into previously all-white yet all-important areas of law e.g., corporate law firms, District Attorneys' Offices, ensuring thereby that the interests of Blacks and other minorities are represented and promoted. CLEO graduates are earning competitive salaries for recent graduates. This gives the graduate greater freedom to further his professional interests and the interests of his community. In short, CLEO graduates are making it and making it very well.

What began five years ago as a bold experiment subject to substantial skepticism and apprehension is now emerging as one of the most significant experiments in the field of legal education ever undertaken. Not only have these CLEO students survived 3 rigorous years in law school but they have at the same time succeeded in transforming the very institution that generates lawyers, i.e., the law schools, as is evidenced by the emergence of clinical programs to assist the poor and the refocusing of curricula upon poverty and the legal process. In brief, if the impact that the CLEO student as a member of a new generation of minority attorneys has had upon the law schools is any indication of the impact he will have upon the world of the practitioners, we have just begun to witness a fundamental and more equitable reorganization of the legal profession and the many social institutions over which it holds sway.

Both the House and Senate ultimately passed the appropriations bill, H.R.13172 and President Ford signed the legislation on June 1, 1976 (Pub. Law 94-304), providing program funds until June 20, 1977.

Congress has consistently legislated in favor of promoting racial integration; the support given to CLEO after such rigorous scrutiny can only confirm the congressional commitment. Therefore, the judgment of the Supreme Court of California below in favor of Allan Bakke's claim ought to be reversed as violative of the congressional mandate to promote racial integration.

CONCLUSION

CLEO has provided data which speaks to the qualifications of law school applicants and to the successes of special admission programs; inroads have been made toward reversing the historic pattern of racial exclusion in higher education. Competent, dedicated, and active attorneys from the ranks of Blacks and other racial minorities have been produced. They serve not only in those depressed areas of social and economic concerns but in traditional legal and political roles as well.

Such successes ought not be stopped. For, the programs making this possible, such as CLEO, have congressional approval, are not constitutionally infirm, and most of all they work! The decision of the Su-

preme Court of California in *Bakke* v. *Regents of the University of California* should be reversed.

Respectfully submitted,

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